United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7143

To be argued by
John E. Hunt,
Utica, N. Y.

United States Court of Appeals

For the Second Circuit.

B

P/S

MALACHY J. SMYTH and LUCY SMYTH,
Plaintiffs-Appellants,

vs.

THE UPJOHN COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK.

DEFENDANT-APPELLEE'S BRIEF.

KERNAN AND KERNAN,
Attorneys for Defendant-Appellee,
First National Bank
Building,
Utica, N. Y. 13501
(315) 724-6128.

JOHN E. HUNT,
Of Counsel.

THE REPORTER COMPANY, INC., WALTON, N. Y. 13856—607 865 4191—1975

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For the Second Circuit.

Malachy J. Smith and Lucy Smith,

Plaintiffs-Appellants,

vs.

The Upjohn Company,

Defendant-Appellee.

On Appeal From the United States District Court for the Northern District of New York.

BRIEF FOR DEFENDANT-APPELLEE.

Counterstatement of Question Presented.

Did the trial court commit reversible error in sustaining appellee's objection to the receipt in evidence of Supplement C/70 (Exhibit 11A) to Physicians' Desk Reference promulgated by appellee subsequent to the date that appellant husband had taken the drug Lincocin?

Statement of Facts Relevant to Issue Presented for Review.

Appellant is a 60-year-old physician and surgeon licensed in 1965 to practice in New York State. Prior thereto he had been similarly licensed and practiced in England, Ireland and Canada. His specialty was ortho-

pedics. In 1966 he came to Utica and has since practiced orthopedic surgery (Append. 1a-8a*).

Appellant had knowledge of the drug Lincocin (manufactured by Appellee) and prior to February 3, 1970, had prescribed it 40 or 50 times for use by his patients without adverse effects. In 1967 the doctor himself had used the drug for an infected tooth (Append. 9a-11a).

In February, 1970, appellant developed sinusitis and on the third and fourth days of that month took 500 milligrams of Lincocin twice a day. Thereafter, he began to have diarrhea and on February 5th he changed to the injection form of Lincocin using 600 milligrams once a day. On the 6th he stopped taking the drug (Append. 12a-13a; 14a-17a).

Thereafter appellant developed a sore throat which he diagnosed as a fungus infection and prescribed for himself 500,000 units of Mycostatin taken three times a day which he continued to take until he entered a Utica hospital some three weeks later (Append. 18a-19a).

Later in February, 1970, the doctor went to a convention in Atlanta, Georgia, for three days and from there to Clearwater, Florida. He continued to have diarrhea and finally went to a hospital in Clearwater where a doctor advised him to return to his home in Utica. He left Clearwater on March 10 and upon his return home continued to take the Mycostatin and was in bed for six or seven days. Finally on March 19—six weeks after the diarrhea had commenced—appellant consulted Dr. Dwyer, from whom he leased office space and whose office was next to

*References, unless otherwise stated, are to pages in appendix of appellee.

Dr. Smyth's. The following day appellant entered a hospital where he remained until April 15 (Append. 19a-26a).

Dr. Smyth identified a copy of Physicians' Desk Reference (Ex. 11) which is a book containing information for the medical profession on major pharmaceutical products and a so-called package insert (Ex. 11-b) both of which in identical language set forth "warnings" about and a statement as to "adverse reactions" to Lincocin. Appellant had read both before taking Lincocin on February 3, 1970 (Append. 28a, 29a-30a).

The "warning" statement (Ex. 11) reads as follows:

> "Warning: *Cases of severe and persistent diarrhea, some with blood and mucus in the stools have been reported and at times have necessitated discontinuance of the drug.* This side effect usually has been associated with the oral dosage form but has occasionally been reported following parenteral therapy." (Italics in original; Appellants' Append. p. 9a.)

Parenteral therapy is the use of the drug by injection or any manner, other than orally (Append. 29a).

The portion of the two exhibits entitled "Adverse Reactions" reads as follows:

> "Adverse reactions: gastrointestine, glossitis, stomatitis, nausea, vomiting, persistent diarrhea, enterocolitis and pruitis ani."

Enterocolitis is an inflammation of the small and large bowels (Append. 29a-31a).

Some months later and on November 21, 1970, appellant consulted Dr. Balint in Albany, New York, about his

loss of weight and continuing diarrhea. Dr. Balint is a gastroenterologist specializing in diseases of the colon and bowel. He is Professor of Medicine and Head of the Division of Gastroenterology of Albany Medical College. In the opinion of appellant Dr. Balint had the highest reputation in the field of gastroenterology of all the doctors who had treated him during his illness (Append. 26a-27a; 32a and 39a).

On cross examination of appellant, Dr. Balint's records (Def's. Exhibit C) were marked for identification (Append. 33a, 34a). These revealed that in December, 1970, the doctor had diagnosed appellant's condition as Crohn's disease which could not be caused from taking Lincocin (Append. 36a-37a).

Further, this record (Def's. Ex. C for ident.) disclosed a letter of April 9, 1971, from appellant to Dr. Balint in which Dr. Smyth in substance asked the former's support in obtaining "recompense from (appellee)" and "if (Dr. Balint) could state that (appellant) suffered from Lincocin colitis" (Append. 37a).

Dr. Balint replied by letter of April 30, 1971 (Def's. Ex. C-1), in which he stated in part:

> "I have now had an opportunity to review the literature concerning the toxicity of Lincocin. As I rather suspected, the review is somewhat unconvincing in terms of the production of the type of disease which you had. In all the cases that I have been able to find, the condition was acute and of very short duration.
>
> "I have some serious doubt as to whether the condition produced was the same as the one from which you suffered. I think it would perhaps be best if we could discuss this matter at sometime

> when you next come to see me and decide then how to proceed.
>
> "It is, of course, possible that in your own case the Lincocin was responsible for the production of the colitis, but its long duration and its radiologic appearances make me suspect that in your instance, this was a coincidence rather than a cause or relationship" (Append. 39a-40a).

Thereafter, and in 1973, appellant and his lawyer conferred in Albany with Dr. Balint and concluded that the doctor would not be called as a witness (Append. 41a).

The aforementioned Dr. Dwyer, who had treated appellant after his return from Florida and the passing of some six weeks during which Dr. Smyth had been treating himself, testified that he diagnosed appellant's condition as colitis but conceded that he had not entered this in his records but only that the patient had diarrhea (Append. 42a-43a).

On cross examination a hypothetical question was posed to the doctor which, in substance, stated appellant's condition when he departed for Atlanta and Florida, namely, sore throat, diarrhea for three weeks, blood in the stool, stomach pains, cramps and general malaise. The question posed was what a physician, in good medical practice, should prescribe? The doctor's reply was that the patient should be hospitalized (Append. 44a-46a).

Further upon this issue that appellant's negligence in his persistent self-treatment of his gastrointestinal infection for a period of six weeks was the proximate cause of his continued illness is emphasized by this quotation from the cross examination of Dr. Dwyer:

> "Q. Well, do your records indicate what medication he had had before he came to see you? A. No.

"Q. Wouldn't that be important to know what medication he had taken before he came to see you or before you met him in the lot? A. It would be helpful, but it was an obvious infection that needed treatment, and I don't know whether he had treated it before or not.

"Q. And within a period of three or four days you started to get that infection under control, did you not? A. Yes.

"Q. And did it appear obvious to you that the treatment that had been going on before that was obviously inadequate? A. I think that was an assumption.

"Q. A fair assumption? A. Yes.

"Q. So whatever medical treatment Dr. Smyth had been getting between February 3 and March 20, it is your opinion that the treatment was not in accordance with good medical standards as existed in Oneida County at that time? A. Well, they weren't adequate.

"Q. They weren't adequate. If they weren't adequate, they weren't good, is that a fair statement? A. You could assume that" (Append. 49a-51a).

Appellant called Dr. Wallace, a Utica physician specializing in internal medicine and a sub-specialty of gastroenterology (Append. 52a-53a). The doctor had not attended or treated Dr. Smyth. He had, however, examined plaintiff's exhibits 16 to 65, a series of reports from the files of appellee of patients who had taken Lincocin and later develop gastro-intestinal symptoms (Append. 53a-54a).

Dr. Wallace expressed the opinion based on these adverse reaction reports (Pltff's. Exhibits 16 to 65) that in good medical practice the heretofore quoted "Warnings" set forth in the Physicians' Reference Book (Ex. 11) and the so-called package insert (Ex. 11-b) were not sufficient (Append. 55a-60a).

Facts Upon Which the Issue Presented are Based.

Immediately thereafter appellant's counsel showed Dr. Wallace Supplement C of 1970 to the Physicians' Desk Reference that had been promulgated subsequent to the date (February 3, 1970) that Dr. Smyth had taken the Lincocin. The pertinent part of the supplement related to the warning and, in substance, added thereto the words "acute colitis."

The former and amended provisions of the "warning" are as follows:

Original Provision (Ex. 11)	*Supplement C of 1970 (Ex. 11-A)*
"Warning: *Cases of severe and persistent diarrhea, some with blood and mucus in the stools have been reported and at times have necessitated discontinuance of the drug.* This side effect usually has been associated with the oral dosage form but has occasionally been reported following parenteral therapy." (Italics in original; Appellants' Append. p. 9a.)	Warnings: Cases of severe and persistent diarrhea have been reported and have at times necessitated discontinuance of the drug. This diarrhea has been occasionally associated with blood and mucus in the stools and has at times resulted in an acute colitis. This side effect usually has been associated with the oral dosage form but occasionally has been reported following parenteral therapy. Although no cross sensitivity with other antibiotic agents has been demonstrated, a careful inquiry should be made concerning previous sensitivities to drugs and other allergens." (Appellants' Appendix, p. 12a.)

A comparison of the two warnings shows a slight change in the construction of the first two sentences but

the only change of substance in the warning is that diarrhea "has at times resulted in an acute colitis."

The following are the former and amended provisions of the stated "adverse reactions":

Original Provision (Ex. 11)	*Supplement C of 1970 (Ex. 11A)*
Adverse Reactions:	*Adverse Reactions:*
Gastrointestinal-Glossitis, stomatitis, nausea, vomiting, persistent diarrhea, entercolitis and pruritis ani. (Appellants' Append. p. 9a.)	Gastrointestinal-Glossitis, stomatitis, nausea, vomiting, Persistent diarrhea, enterocolitis and pruritus ani. (See "Warnings.") (Appellants' Append. p. 12a.)

These, as can be seen, are identical except for the reference in the later publication to the "Warnings." It should be emphasized that both mention enterocolitis which is a more encompassing term than colitis.

Thus, the following is found in the cross examination of Dr. Wallace:

> "Q. And you have given an opinion—did you look at the section 'adverse reactions' in your PDR? A. Yes.
>
> "Q. Did you see the word 'enterocolitis'? A. Yes.
>
> "Q. What is enterocolitis? A. Enterocolitis is an inflammation of the small and large intestine.
>
> "Q. And colitis is an inflammation of the— A. (Interrupting) Large intestine.
>
> "Q. And enterocolitis is a more encompassing term, is that correct? A. Yes, it may be vague.
>
> "Q. Is it in the medical dictionary? A. Yes" (Append. 61a).

Exhibit 11-a was offered in evidence by appellant and following appellee's objection thereto the jury was excused. The admissibility of the exhibit was thereafter discussed by the court and respective counsel. In sum, appellant's counsel argued that the warning contained in the later supplement (drug "has at times resulted in an acute colitis") should have been used at an earlier date. The trial court pointed out that Upjohn's literature had always warned that "enterocolitis" was a possible adverse reaction to the drug (Appellant's Append. p. 6).

In the light of this statement by the court it should be here interpolated that the hospital records show that appellant's condition was diagnosed as enterocolitis. We quote from the cross examination of Dr. Dwyer, his attending physician:

> "Q. All right. What is the clinical diagnosis that appears in the hospital records concerning Dr. Smyth on page six of the hospital records while you were treating him in March and April, 1970, will you read the words of the jury? A. Enterocolitis.
>
> "Q. Enterocolitis. Doctor, you say that you have confused the word diarrhea with colitis, is that correct? A. No.
>
> "Q. That you put it down by mistake? A. I put diarrhea down, and I said that was a symptom rather than a diagnosis.
>
> "Q. All right. If you saw the words 'severe and persistent diarrhea with blood and mucous in the stools,' as a medical man would that alert you to colitis? A. Yes.
>
> "Q. And that is true of any physician with adequate training in your opinion? A. I presume he would think that way.
>
> "Q. All right. Enterocolitis involves inflammation or disease of the small intestine and the large bowel, is that correct? A. I think that is a correct diagnosis.

"Q. Enteritis concerns just the small intestine and colitis just the large bowel, is that correct? A. Yes.

"Q. Which is the more encompassing term, in other words, if you were going to describe something, what would you describe, what would be the more inclusive term, enterocolitis or enteritis or colitis? A. Enterocolitis would involve the large and the small" (Append. 47a-48a).

The issue presented by this appeal is summarized in the following colloquy between the court and appellant's counsel:

"The Court: So what are you proposing using this evidence for?

"Mr. Coup: I will have Dr. Wallace testify that in his opinion the warning which existed in 1970 was insufficient.

"The Court: All right, great, that puts you in a good position.

"Mr. Coup: He will testify that—

"The Court: I am talking about this supplement, what use is this supplement to you?

"Mr. Coup: To show that they should have used that warning. Really they should have use the warning they had in 1974.

"The Court: Well,—

"Mr. Coup: Based upon what he has examined.

"The Court: That is actually exactly what I am getting at, isn't that precisely what you can't use it for?

"Mr. Coup: If he states that in his opinion—

"The Court: But isn't that precisely what you just got through telling me, that you can't use subsequent repairs or subsequent events to establish negligence?

"Mr. Coup: You can use it as an exception to that rule.

"The Court: For what purpose?

"Mr. Coup: For a foundation.

> "The Court: For instance, in your Pennsylvania case they used it for one purpose, to show the simplicity with which it could be changed, perhaps a telephone call to get it out to the trade. In the after repair cases, as you have indicated, it is used where control is denied, it must be established, but it isn't used to establish negligence" (Appellants' Append. pp. 7-8).

The court ultimately sustained the objection to the offer in evidence of the amended warning (Ex. 11-a) promulgated subsequent to appellant taking the drug.

Appellant's counsel then sought to have Dr. Wallace testify as to what, in his opinion, would have been a sufficient warning. The court refused to receive such opinion evidence (Appellants' Append. pp. 9-10).

The Issue Presented on the Appeal.

Before discussing the contentions of appellants it is necessary in the light of certain exhibits included in appellants' appendix and statements made in appellants' brief to state the issue that we conceive is before the court for decision. Appellants' offer of proof is found at pages 1 to 10 of their appendix.

Examination thereof shows that Exhibit 11A—Supplement C of 1970 to Physicians Desk Reference (PDR) was offered in evidence (p. 1). Thereafter, counsel for appellants made reference to this 1970 supplement and also to a 1972 supplement whereupon the court interrupted and in substance limited the discussion to Exhibit 11A (pp. 5-6). Subsequently, and in passing counsel for appellants did state (p. 7) that "Really (Upjohn) should have used the warnings they had in 1974." Eventually, the court sustained the objection to the offer of Exhibit 11A (p. 8).

Appellants, however, include in their Appendix Exhibit 66 (1972 Supplement to PDR); Exhibit 66A (1974 Supplement to PDR) and Exhibit 67 (1974 Supplement B to PDR). Furthermore, appellants in their brief (pp. 5 to 7) discuss the contents of the warnings in these supplements.

We submit that the offer of proof contained in appellants' appendix was limited to Supplement C of 1970 (Exhibit 11A) and Exhibits 66, 66A and 67 were improperly included in the appendix for the reason that they were never offered by appellants or their admissibility rule on by the trial court. We, accordingly, shall discuss the issue presented by appellants' appendix.

POINT I.

The trial court properly ruled that a warning relating to Lincocin published by appellee subsequent to the use of the drug by appellant was inadmissible.

The majority and general rule is that proof of remedial action taken after an accident or happening is not admissible in evidence. The rationale of the rule was long ago stated in *Columbia Railroad Co. v. Hawthorne*, 144 U. S. 202, 207:

> "Upon this question there has been some difference of opinion in the courts of the several States. But it is now settled, upon such consideration, by the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent be-

> fore the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant" (citing cases including *Corcoran v. Village of Peekskill,* 108 N. Y. 151).

And in *Northwest Airlines, Inc., v. Martin Company,* 224 F. 2d 120, cert. den. 350 U. S. 937, plaintiff (Northwest), a commercial airline, brought an action against defendant (Martin), an aircraft manufacturer, for alleged negligence in design and manufacture of a plane, whereby, the wing span was vulnerable to metal fatigue. Plaintiff offered but the trial court rejected proof that defendant made modifications in the wing joint after the accident. In sustaining the ruling of the trial court it was said (224 F. 2d at page 130):

> "We believe too that the district court was correct in refusing to permit Northwest to use the evidence of the modifications in the wing joint, made by Martin after the damage was discovered, to show what Martin should have done in the first place. Northwest argues that its purpose was simply to show what Martin could have done in the original design and manufacture of the wing joint, but the result would have been to provide a basis for inferring what should have been done. This kind of hindsight evidence is not properly admissible upon the issue of ordinary care."

The same legal principle has been enunciated by the courts of this State.

> *Getty v. Town of Hamlin,* 127 N. Y. 636;
> *Corcoran v. Village of Peekskill, supra,* 108 N. Y. 151;
> *Degan v. Champlin Transp. Co.,* 56 N. Y. 1;
> *Del Ricco v. Montwill Corp.,* 16 A. D. 2d 791.

The rule uniformly followed by the courts of this State was succinctly stated in *Corcoran v. Village of Peekskill, supra,* 108 N. Y. at page 155:

> "After an accident has happened it is ordinarily easy to see how it could have been avoided; and then for the first time it frequently happens that the owner receives his first intimation of the defective or dangerous condition of the machine or structure which caused or led to the accident. Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe and secure. While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury. Hence in this court, and generally in the Supreme Court, it has been held erroneous to receive such evidence."

Appellants contend, however, that this evidentiary rule is no longer applicable in cases of strict liability in tort and implied warranty where one injured by a defective product seeks to recover from the product's manufacturer. Appellants to sustain this contention rely on *Sutkowski v. Universal Marion Corp.,* 5 Ill. App. 3d 313, 281 N. E. 2d 749, and *Ault v. International Harvester Co.,* 117 Cal. Rptr. 812, 528 P. 2d 1148.

It is our submission that these authorities are clearly distinguisable and that the majority view is that the exclusionary rule evolved in other negligence cases are implemented in product liability cases. See generally, 1 Products Liability, Frumer-Friedman, §12.04, page 338.

In the following decisions it has been held that remedial measures taken subsequent to an accident or happening were not admissible in evidence:

Otis Elevator Co. v. McLaney, 406 P. 2d 7 (defendant Elevator company under contract to maintain elevator, changed lubricant it used on rubbers of doors);

Mobberly v. Sears, Roebuck & Co., 4 Ohio App. 2d 126, 211 N. E. 2d 839 (improvement in manufacture of product);

Phipps v. Air King Mfg. Corp., 501 P. 2d 790, (alleged defective truss redesigned);

Kapp v. Sullivan Chevrolet Co., 234 Ark. 395, 353 S. W. 2d 5 (changes made in seat belt specifications);

Ditmar v. Ahern, 37 Ill. App. 2d 167, 185 N. E. 2d 264 (Manufacturer changed instructions for mixing and applying paint);

Mabe v. Huntington Coco-Cola Co., 145 W. Va. 712, 116 S. E. 2d 874 (caution sign placed on tank subsequent to explosion).

In *Ault v. International Harvester Co., supra,* 117 Cal. Rptr. 812, 528 P. 2d 1148, the principal authority relied on by appellants, plaintiff was injured in an accident involving a motor vehicle manufactured by defendant. It was alleged that the accident was caused by a defect in the design of the gearbox of the vehicle. Proof was received that three years after the accident defendant changed from aluminum to malleable iron in the production of the gearbox. A California statute (Section 1151 of Evidence Code) excluded evidence of subsequent remedial or precautionary measures when offered to prove negligence or culpable conduct. On appeal the Supreme Court held the admission of the evidence to be reversible error and rejected the contention that the statute was only applicable to the negligence theory (110 Cal. Rptr. 369, 515 P. 2d 313). Thereafter, the court denied a

motion for a rehearing but vacated its previous opinion and reached a contrary conclusion—that the judgment should be affirmed as the statutory exclusionary rule did not apply to products liability cases. Predictably, in the light of these facts, there was a vigorous dissenting opinion in which it was stated (528 P. 2d at p. 1156):

> "Notwithstanding the lack of probative value, juries, in the heat of negligence or product liability trials—learning only of a single change—may conclude the change reflects an admission of negligence or defect and may give great and decisive weight to the perceived admission. The danger of such misuse of evidence is at least as great in product liability cases as in negligence cases.
>
> "The lack of probative value and the danger of misuse of evidence of subsequent change are not cured when the issue before the jury is defect rather than negligence, and no reason exists for refusing to give the word 'culpable' its common meaning. Accordingly, I conclude that section 1151 should be applicable in product liability cases."

This decision appears to be of little or no assistance in deciding the issue before this court. In sum, the California court construed a section of the State's Code of Evidence and concluded that its language did not apply to a products liability case.

Similarly, in *Sutkowski v. Universal Marion Corp.*, 5 Ill. App. 3d 313, 281 N. E. 2d 749, plaintiff's intestate was crushed by a large stone which rolled beneath a strip mining machine while decedent was walking thereunder. There was expert testimony of alternate methods or design that would have reduced the hazard. The trial court, however, excluded post occurrence modifications of the machine that in substance implemented the opinion evidence of the expert. In holding that the exclusion of

the post occurrence changes was reversible error the court stated that alternative methods or designs were relevant and material in negligence cases and therefore no reason existed to exclude such proof in a products liability case. Stated otherwise, the court was considering a well recognized exception under Illinois decisional law to the general rule that proof of subsequent remedial action was not admissible. It concluded that in as much as the exception was applicable in negligence cases it should be applied in a products liability case.

Lastly, appellants cite *Incollingo v. Ewing,* 444 Pa. 263, 282 A. 2d 206, an action against several defendants, including a drug manufacturer, for injuries allegedly caused by wrongful administration of an antibiotic drug. Following a recovery and on appeal the drug manufacturer contended that the trial court erred in admitting, over objection, evidence of a subsequent warning (employed in packaging and other literature after the doctors had prescribed the drug). The Supreme Court held there was no reversible error. The holding, however, was based on an evidentiary rule peculiar to the jurisdiction (Pennsylvania) that has never been embraced or implemented by New York State. This rule was thus stated by the court (282 A. 2d at pp. 222-223): "Although precautions taken after the acts complained of are inadmissible for the purpose of proving antecedent negligence (*Baron v. Reading Iron Co.*, 202 Pa. 274, 51A. 979), such evidence is admissible if competent for any purpose and as long as it is so qualified by instructions to the jury. *Hyndman v. Pa. Railroad Company,* 396 Pa. 190, 152A. 2d 251. In the latter case it was held that evidence of the type here in issue is admissible 'to show a caution which was not costly or burdensome to the defendant in relation to the risk or danger involved.' *Id.* at p. 200, 152A. 2d at p. 256." The short answer to appellants' reliance on this

authority is that New York State has never approved such an evidentiary rule and the decision is inapposite.

Although appellants do not mention the subject, we assume that state law, here New York's, governs this action (*Fredericks v. American Export Lines,* 227 F. 2d 450, cert. den. 350 U. S. 989). Appellants do concede (brief, p. 8) that it is the law of New York that proof of remedial action taken subsequent to the acts complained of are not admissible on the issue of failure to use due care. They contend, however, that the evidentiary rule should not apply in a products liability case involving an antibiotic drug. Research discloses no decision where a New York court has passed directly on this issue. It appears, therefore, that this court must exercise its "prophetic judgment" in determining what New York courts would do if faced with the problem (*United States v. O'Connell,* 496 F. 2d 1329, 1332).

New York has consistently held proof of subsequent remedial action to be inadmissible for three reasons—lack of relevance, a public policy favoring encouragement of subsequent remedial action and the natural tendency of the evidence to influence a jury (*Corcoran v. Village of Peekskill, supra,* 108 N. Y. 151).

The same reasons suggest that when the question is presented to a New York court it will follow the same rule as have courts of other jurisdictions in products liability actions.

Thus, in *Stephan v. Marlin Firearms Company,* 353 F. 2d 819, this court passed upon a verdict in favor of defendants in a products liability action based on Connecticut law wherein one of the defendants (Marlin) was charged with negligent design of its 1947 model rifle sold to plaintiff's intestate. Proof was offered by plaintiff

that an offset spur had been designed and manufactured by Marlin subsequent to the marketing of the 1947 model. This court held (p. 823) that the trial court had properly excluded the proof as "Under Connecticut law, evidence as to remedial measures taken after an accident is excluded on the basis of a policy to encourage repairs (citing Connecticut case)."

And in *Cox v. General Electric Company,* 302 F. 2d 389, another products liability action, plaintiff alleged that defendant was negligent in the design and construction of a washing machine in that the safety braking device was inadequate. The trial court refused to receive proof that changes had been made by defendant subsequent to the accident by installing an improved braking device. The Sixth Circuit held that the ruling was correct relying on its earlier decision in *Northwest Airlines v. Glenn L. Martin Company,* 224 F. 2d 120, cert. den. 350 U. S. 939, *supra.*

Appellants submit nothing to alter the consistency of these holdings. They rely, as stated, on three decisions (California, Illinois and Pennsylvania) in each of which the court held the proof admissible solely on grounds that either related to other rules of evidence peculiar to the jurisdiction or, as in the California decision (*Ault v. International Harvester, supra*), reached a legal conclusion that is the opposite of everything New York courts have written on the subject.

POINT II.

The amended "warnings" contained in the rejected Exhibit 11A have no relevancy to the issues presented on the trial.

We have heretofore set forth in parallel columns the "warnings" and "adverse reactions" contained in the literature published by appellee that appellant read prior to taking the drug (Ex. 11) and those in Supplement C of 1970 (Ex. 11A) published subsequent thereto that the trial court refused to receive.

The only amendment to the "warning" was the addition of the words that diarrhea "has at times resulted in an acute colitis." There is no proof, however, that appellant's condition was diagnosed as acute colitis. Dr. Dwyer, the attending physician, testified that he made a diagnosis of colitis but admitted that he had not entered this in his records but only that appellant had diarrhea (Append. 41a-42a).

Appellants in their brief (p. 2) attempt to establish that the new warning about acute colitis had some relevancy by the statement that Dr. Heintz performed barium X-ray studies and that this "indicated" that appellant had been suffering from ulcerative colitis. This proof is not made a part of appellants' appendix.

In any event, appellant testified that he read Upjohn's "warnings" and "adverse reactions" before taking the drug (Append. 28a, 29a-30a). The latter warned that enterocolitis was a possible adverse reaction. Enterocolitis is an inflammation of the small and large intestine and colitis is an inflammation of the large intestine (Append. 61a).

It follows that appellee had adequately warned this physician that enterocolitis—a more encompassing term than colitis—was a possible adverse reaction if he took the drug.

In summary, the sole question raised by appellants, as to the admissibility of the amended warning, becomes insignificant in the light of the facts presented at the trial upon which the jury decided that plaintiffs had no cause for action.

First, appellant husband, as a physician, contributed substantially to his physical condition by rendering inadequate medical care to himself as established by the testimony of Dr. Dwyer, who eventually became his attending physician, after the passing of more than six weeks during which period Dr. Smyth journeyed to Florida and continued to take other drugs. Dr. Dwyer, as heretofore stated, expressed the opinion that this self-treatment was not in accordance with good medical standards. All of this is emphasized by the further testimony of Dr. Dwyer that within three or four days after appellant husband entered the Utica hospital in March, 1970, the intestinal infection was under control and recovery commenced (Append. 48a-50a).

Next, there is clear proof, as the jury presumably found, that Dr. Smyth's medical problem was not caused by or related to the taking of Lincocin. Dr. Balint, the physician who appellant consulted and who he believed had the highest reputation in the field of gastroenterology of all the doctors who had treated him during his illness (Append. 32a), diagnosed the condition as Crohn's disease which could not be caused from taking Lincocin (Append. 36a-37a) and further that while it was "possible" that the drug was responsible that because of the long duration and the radiologic appearances of the ill-

ness made Dr. Balint "suspect" that the taking of the drug was "a coincidence rather than a cause or relationship" (Append. 40a).

Lastly, Dr. Smyth testified that before taking the drug he had read the "warnings" and "adverse reactions" (Append. 29a-30a). Therefrom, the doctor was warned of the possibility of "severe and persistent diarrhea." One of the possible adverse reactions was enterocolitis which was a broader term than colitis, but both described inflammation or infection of the intestinal tract. Dr. Dwyer, the attending physician, testified that the words in the warning—"severe and persistent diarrhea" would alert him to colitis and presumably would so alert any physician with adequate medical training. (Append. 47a).

And upon the same subject, Dr. Wallace, the specialist in gastroenterology, called as an expert by appellants, testified that the warning read by Dr. Smyth was a "red flag as to the possibility of colitis" (Append. 61a):

> "Q. Doctor, what is a persistent diarrhea with blood and mucous in the stools, what does that mean to a physician? A. By and large acute colitis, acute ulcerative colitis.
>
> "Q. That is indicative of acute colitis or ulcerative colitis? A. Yes.
>
> "Q. That is what that would mean if you read those words, is that right? A. That is true.
>
> "Q. And this warning did say 'cases of severe and persistent diarrhea, some with blood and mucous in the stools have been reported,' and to a physician that would paint a red flag as to the possibility of colitis, isn't that a fact? A. That could be true.
>
> "Q. Well, it would be true, wouldn't it, Doctor? A. Yes."

The conduct of Dr. Smyth in ignoring the warnings he had before him defies rationalization or explanation. When the adverse reaction set in the doctor did not stop taking the drug but changed from oral administration to injection of 600 milligrams daily (Append. 16a). When he finally stopped taking the drug he started taking 500,000 units of Mycostatin three times a day until he entered the hospital some weeks later (Append. 19a). In the meantime there was the jaunt to Atlanta, Georgia, and Florida and the eventual visit to a Clearwater hospital where a doctor advised him to return home. He did so and remained in bed for six or seven days. Finally, and, as stated, more than six weeks after first taking the drug, he consulted Dr. Dwyer who hospitalized him and prompt recovery commenced (Append. 20a-26a; 49a-51a).

In the light of the actual facts before the court and jury, it is submitted that the amended publication (Exhibit 11A) not only was inadmissible under New York law but could not have had any pertinency or relevancy to the presented factual issues.

POINT III.

The judgment should be affirmed.

Respectfully submitted,

KERNAN AND KERNAN,
Attorneys for Defendant-Appellee,
First National Bank Building,
Utica, N. Y. 13501
(315) 724-6128.

JOHN E. HUNT,
Of Counsel.